

Legal Opinion: GMP-0092

Index: 7.351, 7.543
Subject: FOIA Appeal: Management Review Questionnaire

June 19, 1992

Mr. David R. Brigstock
c/o Ms. Kerstin Hildebrandt
Chairperson,
Charlesbank Apartments Tenants Association
650 Huntington Avenue
Apt. 3L
Boston, Massachusetts 02115

Dear Mr. Brigstock:

This is in response to your Freedom of Information Act ("FOIA") appeal dated May 30, 1991. You appeal the May 28, 1991 partial denial by Nick Nibi, then Director of the Office of Housing in the Boston Regional Office, of part of your May 14, 1991 FOIA request. In response to your request for documents pertaining to management inspections, Mr. Nibi withheld a Management Review Questionnaire ("Questionnaire"), Form HUD-9834B, that was completed on April 30, 1991. Mr. Nibi cited Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), as the relevant exemption that permitted him to withhold the document.

I have concluded that Mr. Nibi's decision to withhold the Questionnaire was proper under the FOIA.

Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Incorporated into Exemption 5 are a number of privileges available in civil discovery, including the deliberative process privilege. See, *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132, 149 (1975). The deliberative process privilege applies to documents that are both predecisional and deliberative in nature. A predecisional document is one that is "antecedent to the adoption of an agency policy." *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). A deliberative document is a "direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

I have concluded that the Questionnaire is exempt from mandatory release pursuant to Exemption 5 of the FOIA. The Questionnaire is predecisional in that it was completed prior to the Department's decision to take official action in the form of the issuance of a Management Review Report ("MRR"). The Questionnaire is deliberative in that the findings made therein constituted internal recommendations and preliminary conclusions

subject to further review prior to the issuance of a formal MRR.

Your appeal challenges the rationale for withholding the Questionnaire inasmuch as MRR's had been released by the Boston Regional Office in response to your previous FOIA requests. You stated your position as follows:

Clearly, any and all important information on Form HUD-9834B the Questionnaire must be included on Form HUD-9834 the MRR otherwise the contents of the latter would not be a true and accurate reflection of the former.

Based on this supposition, you argued that since the MRR is releasable, the Questionnaire must also be releasable.

I disagree that if an MRR is releasable, it necessarily follows that the Questionnaire upon which it was based must also be releasable. It is not true, as you assume, that all of the information included on a Questionnaire is ultimately incorporated into an MRR. The Questionnaire constitutes a single employee's notations with respect to certain aspects of management's operations, while it is only the MRR that represents the Department's official position concerning those operations. The check marks and comments on a Questionnaire are subject to further review, investigation, and revision prior to the final issuance of an MRR by the Department. In other words, the annotations made on a Questionnaire do not necessarily appear in the same form on an MRR.

For these reasons, I have concluded that the Questionnaire is a predecisional and deliberative document that qualifies for exemption from mandatory release in accordance with Exemption 5 of the FOIA. Moreover, pursuant to HUD's regulations at 24 C.F.R. 15.21, I have determined that the public interest in preserving free and frank opinions, advice, and recommendations within the Government militates against release of the Questionnaire.

You are advised that you have the right to judicial review of my determination pursuant to 5 U.S.C. 552(a)(4).

Very sincerely yours,

C.H. Albright, Jr.
Principal Deputy General Counsel

cc: Yvette Magruder, AX
Marvin H. Lerman, 1G